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No. 201

In the Supreme Court of the United States

OCTOBER TERM, 1950

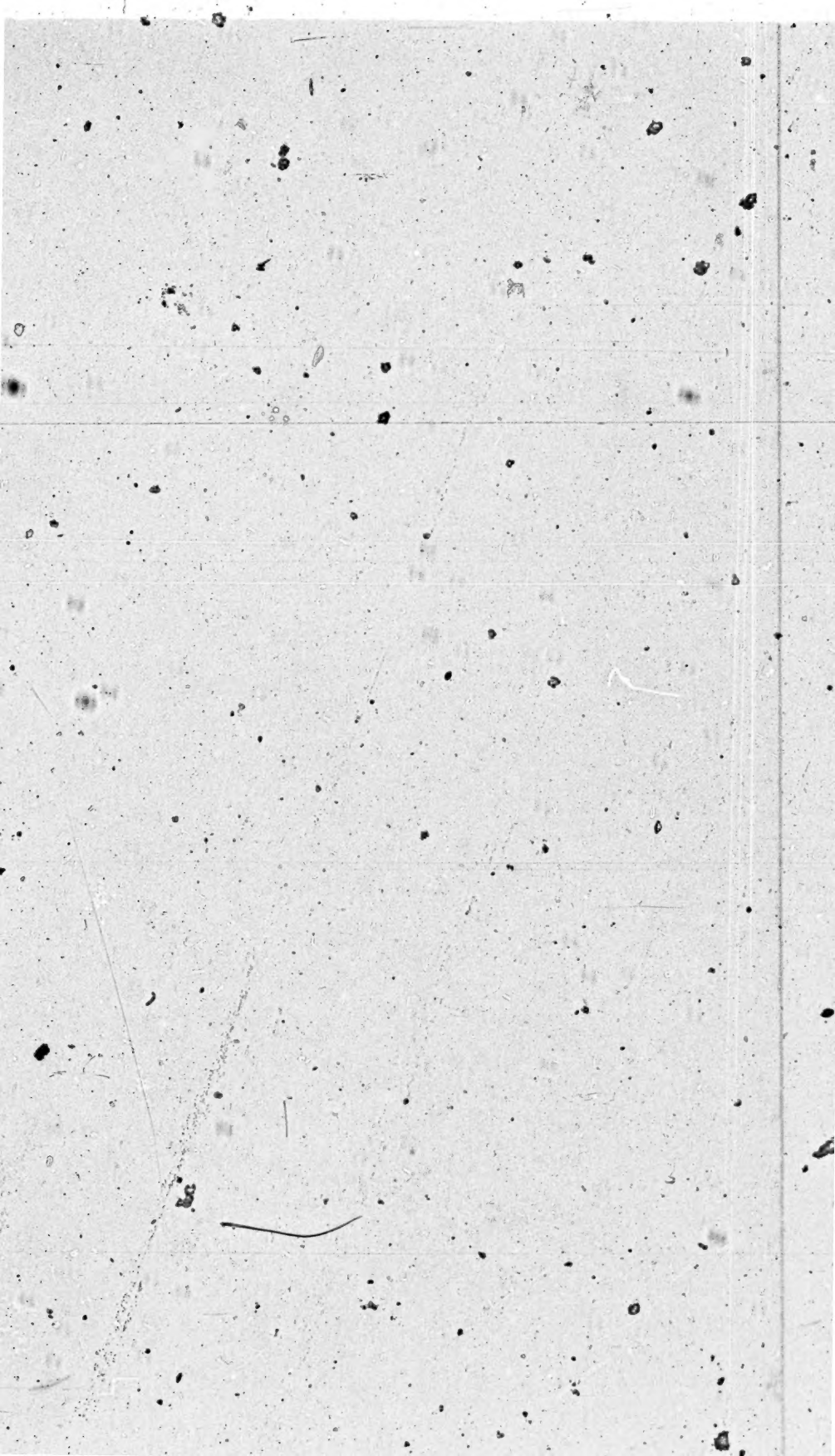
HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. MCCABE, ABRAHAM J. ISSERMAN, AND EUGENE DENNIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES



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OPINIONS BELOW

The majority (3R. 1–31),[1] concurring (3R. 91–111) and dissenting (3R. 111–117) opinions in the Court of Appeals (3R. 1–117) are reported at 182 F. 2d 416. The certificate of contempt filed by the trial court appears as an appendix to the majority opinion (3R. 31–90) and is reported at 182 F. 2d 416, 430.

[1] We adhere to the mode of reference to the various volumes of the record which petitioners have adopted. Petitioners' appendix in the court below is designated "1"; our appendix is referred to as "2"; and the volume containing the opinion and orders of the court below is referred to as "3."

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1950 (3R. 118), and a petition for rehearing was denied on May 15, 1950 (3R. 154). On May 23, 1950, an order was entered by Mr. Justice Jackson extending the time for filing a petition for a writ of certiorari through July 14, 1950 (3R. 155). The petition was filed on July 14, 1950, and was denied on June 4, 1951. A petition for rehearing was filed on June 16, 1951. On October 22, 1951, the petition for rehearing was granted, the order denying certiorari was vacated, and the petition for certiorari was granted limited to the sole question for review quoted below. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Petitioners engaged in a long series of acts of misbehavior in open court during a nine-month trial. The trial judge made it plain to petitioners that their misbehavior was noted by the court and would be punished, but he withheld formal contempt action until the verdict was entered, because to have acted sooner, in the judgment of the trial judge, would have materially contributed to petitioners' purpose so to disrupt the trial as to prevent a final determination of the issues. The question presented, as defined by

this Court in its limited grant of the petition for certiorari, is:

Was the charge of contempt, as and when certified, one which the accusing judge was authorized under Rule 42 (a) to determine and punish himself; or was it one to be adjudged and punished under Rule 42 (b) only by a judge other than the accusing one and after notice, hearing, and opportunity to defend?

Petitioners' brief presents two other points which do not appear to be included within the above question. These points, which out of an abundance of caution are discussed in Points II and III of this brief are:

2. Whether the Specifications in the Contempt Certificate sustained by the court below are so inseparable from Specification I, which was reversed, as to invalidate the concurrent sentences imposed under the Specifications which were sustained; and

3. Whether it was a violation of the due process clause for Judge Medina to adjudicate the petitioners guilty of contempt in the presence of the court because he found, *inter alia*, that petitioners were seeking to impair his health so that the trial could not continue and otherwise to attack him personally.

STATUTORY PROVISIONS AND RULE INVOLVED

Chapter 21 of Title 18, United States Code, provides:

§ 401. *Power of Court.*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 402. *Criminal Contempts.*

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so

damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allow-

ing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioners appeared as defense counsel in the case of *Dennis, et al.* v. *United States,* 341 U. S. 494, a prosecution of eleven leaders of the Communist Party for violation of the Smith Act (now 18 U. S. C. 2385). The case was called for trial on January 17, 1949, and was concluded in the trial court on October 21, 1949, approximately nine months later. Immediately after the jury returned its verdict on October 14, the trial judge filed a certificate of contempt containing forty specifications (1R. 17–73), and appropriate orders

convicting petitioners of the various contempts specified against each of them in the certificate.[2]

The certificate, which was filed in conformity to Rule 42 (a), Federal Rules of Criminal Procedure, is divisible into three parts. The first two pages (1R. 17–18) consist of a "preliminary" statement explaining the necessity for the court's action and the reason why it was delayed until the close of the trial. In it Judge Medina stated that the misconduct of petitioners resulted from a deliberate plan (1) to cause delay and confusion in the trial; (2) to provoke incidents which petitioners intended would result in a mistrial; and (3) to impair his health so that the trial could not continue. The certificate recites that in the court's judgment the maintenance of the dignity of the court and the preservation of order in the courtroom left no alternative—

> than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain.

The second part of the certificate consists of Specification I (1R. 19–20), which recites that petitoners "joined in a wilful, deliberate, and

[2] The trial judge read in open court that portion of the certificate ending with specification I, and the orders which recite the specifications of which each petitioner was convicted (1R. 81–86).

concerted effort to delay and obstruct the trial * * * for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute * * *." The Specification recites thirteen categories of misbehavior in which petitioners indulged during the proceedings as the means by which petitioners sought to "effect" their plan.

The third part of the certificate consists of thirty-nine specific incidents of misconduct which, although they furnish factual support to Specification I, were also found to be severally punishable as contempts (1R. 20–73). The certificate designates which specifications were found to be contempts as to each of the various petitioners (1R. 18).

Several times during the course of the trial, Judge Medina had informed petitioners that he would not take disciplinary action against them during the trial and thus further disrupt the proceedings, but that they would "take the consequences in due time" (2R. 514) (see also 2R. 55, 57, 58, 461–462, 516, 547, 571, 607, 618–619). Many of these warnings occurred in connection with the misconduct charged in particular Contempt Specifications.[3] The court made it plain

[3] For example, Specification VII (2R. 42): "The Court: Now, if you insist, you must, of course, take whatever the

to petitioners and the public throughout the proceedings that petitioners' conduct was not acceptable and constituted misbehavior in the face of the court (see 2R. 56–57, 65–66, 85–86, 93, 100, 118, 139, 152–153, 154, 155, 177, 197, 408, 409, 426, 441–442, 447, 461–462, 473, 476–477, 514, 516–517, 531, 546, 619, 628–629, 641–643, 643–644, 653–654, 680, 702, 712, 721, 722, 733–734).

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consequences are." Specification XXII (2R. 461): "The Court: Now, Mr. Crockett, you seem on the brink of making trouble for yourself. Not now but later." Specification XXIV (1R. 49): "The Court: * * * Now you have already got a very substantial record of disobedience here. You may have an additional record now if you choose to go on. * * * Now as I said before, if you choose to pile up the record of these things against yourself, you may go on." Specification XXX (2R. 571): "The Court: That is just one more mark against you, Mr. Sacher. You would not dare do that but for what I have said as to this trial, and you may live to regret it." Specification XXXI (1R. 55): "The Court: I have heard counsel for the defense here again and again give various excuses, say they have forgotten or it was inadvertent, and I have warned them again and again. I now say that such conduct must be and I find it to be wilfully and deliberately done and contemptuous." Specification XXXII (1R. 60): "The Court: * * * I have had enough contemptuous conduct from you and I am not going to have any more. Mr. Isserman: I am not aware of any contemptuous conduct. The Court: Well, you will be aware, all right." Specification XXXVIII (1R. 71–72): "The Court: Mr. Crockett, that is one of the most contemptuous things that has occurred at this trial. Mr. Crockett: I am trying— The Court: And for that you will be brought to justice. * * * The Court: You say I seemingly do something and accuse me of deliberately evil motives here. That is something that I cannot pass over and I shall not. I now adjudge you in contempt for that."

Petitioner Sacher was convicted of twenty-three separate contempts, and was sentenced to imprisonment for a term of six months on each contempt, the sentences to be served concurrently (1R. 16). Petitioner Gladstein was similarly sentenced for each of eighteen contempts (1R. 13), as was petitioner Dennis on each of five specified contempts (1R. 11). Petitioner Crockett was sentenced to imprisonment for a term of four months on each of nine contempts, the sentences to be served concurrently (1R. 12), as was petitioner Isserman on each of seven specified contempts (1R. 14). Petitioner McCabe was sentenced to imprisonment for a term of thirty days on each of six specified contempts, the sentences to be served concurrently (1R. 15).

Upon the entry of the contempt judgments, each petitioner addressed the Court protesting the judgments (1R. 86–99). In response to petitioner Sacher's remarks conceding "that the power rests in the Court to act summarily" but urging that as a matter of discretion petitioners should have been accorded a hearing (1R. 90–91), the trial judge stated (1R. 91–92):

> Let me say this to you, Mr. Sacher: as to these contempt adjudications, let them be notice to you and to all who may be tempted to follow your example that there is power in the judicial system of the United States under the Constitution and the laws of the United States to protect and maintain the dignity of the court and

> the orderly administration of justice therein.
>
> It is contemplated in the rules that the punishment should be summary. I have waited until today because it was the first time that I could act, as I have indicated in what I read to you from the certificate.

Petitioner Crockett conceded that petitioners were aware during the trial that they were being adjudged in contempt; he said: "Long prior to today your Honor saw fit to adjudge me in contempt, which I believe was the first adjudication of contempt that had been made in the course of the trial" (1R. 95).

Upon appeal to the Court of Appeals, the court found the evidence not "sufficiently clear" to support Specifications XV and XVIII, which charged petitioner Sacher with deliberately attempting to deceive the court. Two of the three members of the court (Frank and Clark, JJ.) were of the view that Specification I charging a continuing joint effort to disrupt the administration of justice was not punishable summarily, and, accordingly, the conviction on that Specification was reversed. The majority of the court (A. N. Hand and Frank, JJ.) in separate opinions concluded that the evidence amply supported the convictions under the remaining thirty-seven specifications and that the convictions were a proper exercise of the summary contempt power in conformity with Rule 42 (a), Federal Rules

of Criminal Procedure. Judge Clark dissented on the ground that the power to convict without a hearing for contempt in the face of the court may be exercised only at the instant of the misbehavior and only if such action is necessary to permit the further functioning of the court.

SUMMARY OF ARGUMENT

I

In order to prevent a mistrial or serious interruption in the *Dennis* case, Judge Medina, after warning petitioners, refrained from punishing them for their contempts until the trial was concluded. Nothing in the language or purpose of Rule 42 (a) of the Federal Rules of Criminal Procedure precluded him from adopting such a sensible procedure. Rule 42 (a) does not require that summary punishment for contempt must be imposed at the instant the contempt occurs. On the contrary, it is clearly sufficient that the judge act as expeditiously as is practicable without breaking up the trial.

The purpose of the summary contempt power is not limited to preventing immediate disorder in the courtroom, as petitioners apparently contend. For the punishment for contempt always takes place after the event, and preserves order primarily by reason of its deterring effect upon future conduct in the same and other cases. "Demoralization of the court's authority" (*Cooke* v. *United States*, 267 U. S. 517; *In re Oliver*, 333

U. S. 257) will occur just as effectively if contemptuous conduct interferes with a court's primary responsibility of administering justice through hearing and promptly deciding cases. The power is essential to prevent the administration of justice from falling into disrepute. *Fisher* v. *Pace*, 336 U. S. 155. Since the summary contempt power rests on a bundle of reasons, and not merely upon the necessity for acting immediately to preserve order and decorum, there is no occasion to read into Rule 42 (a) a time limitation which it does not contain. Certainly, a contemnor cannot be prejudiced by permitting the judge to view the contempt in calmer perspective at the end of the trial instead of requiring him to act at the moment he is provoked. Moreover, a hearing, particularly before another judge, is not an appropriate method for determining facts which occurred within the sight and hearing of the judge.

That the summary contempt power is not limited in the manner suggested by petitioners is established by the reasoning of *Ex parte Terry*, 128 U. S. 289 (which reserved the precise question), and by the holding of every case in the State and lower Federal courts in which the point has been raised. See in particular, *Middlebrook* v. *State*, 43 Conn. 257 (1876) and *In re Cary*, 165 Minn. 203, 206 N. W. 402 (1925). Although the *Cooke* and *Oliver* cases, upon which petitioners rely, were not concerned with the present problem, the

general language employed by this Court does not warrant the narrow interpretation given it by petitioners. Indeed, the *Cooke* case significantly remarks (267 U. S. at 539):

> Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed.

II

Petitioners' argument that the 37 specifications on which they were convicted were dependent upon and inseparable from the finding of agreement embodied in Specification I, which was set aside, is inconsistent with the plain language of the judgments and the contempt certificate, both of which dealt with the contempts separately and imposed separate sentences therefor. Judge Medina's preliminary remarks referred both to the agreement and to the petitioners' individual acts of contempt, and are not predicated merely upon the form, as petitioners assert. In any event these remarks would not prevail over the formal adjudications. Judge Medina clearly intended each finding of contempt to stand on its own feet.

III

Judge Medina was not barred from finding petitioners guilty of contempt by reason of his belief that their scheme to disrupt the trial contemplated the impairment of his health as one

means to that end. The principle that a judge may not sit in a case in which he has a personal interest has never been thought applicable to bar a judge from protecting himself against disrespect, hostility or other forms of attack in the court room, for otherwise the orderly administration of justice could not be maintained. This is established not only by the cases but by Rule 42 of the Rules of Criminal Procedure and the statute from which it was derived, both of which except contempts in the court room from the requirement that another judge be called in when the character or conduct of the judge is attacked. The principle embodied in these judicial and legislative authorities can hardly be deemed unconstitutional.

ARGUMENT

PRELIMINARY STATEMENT

Petitioners have been convicted of a series of contempts because they wilfully and persistently denied to a district court of the United States the silence, respect, and decorum, in its presence, which every person—and certainly every attorney—is obliged to give if a court is to function free from disruption and with public confidence in the unhampered administration of justice. Their conduct, as Judge Medina concluded, was more than a deviation from the professional niceties which a court has a right to expect from its officers, as well as from litigants. It was a purposeful effort to frustrate the court, and thus,

to serve the illicit interest of their clients at the expense of the interests of public justice. It was a rejection of the duties inherent in every attorney's oath,[4] and it was a sharp departure from the conduct which the bar requires from its members.[5]

Six judges of the Court of Appeals have been unanimous in characterizing petitioners' conduct. Judge Clark, dissenting below, referred to it as "abominable" (3 R. 111); Judge A. N. Hand described it as "intolerably obstructive to an orderly trial" (3 R. 29), and Judge Frank termed it "outrageous" (3 R. 91). On the appeal of petitioners' clients another bench of the Second Circuit (L. Hand, Swan and Chase, JJ.) also reviewed the record. That bench found that petitioners did all that they could "to make impossible an orderly and speedy dispatch of the case" and "by *innuendo*, and at times openly [charged the judge] with unfairness and 'judicial misconduct'—often in most insulting language" (*United States* v. *Dennis*, 183 F. 2d 201, 225). Although petitioners sought review here of the evidentiary basis for the findings of contempt, the limitation upon the scope of the writ has barred further consideration of that question. The Government is entitled to

[4] See opinion of Mr. Justice Field, dissenting in *Ex parte Wall*, 107 U. S. 265, 303–304; *Booth* v. *Fletcher*, 101 F. 2d 676, 680–681 (C. A. D. C.), certiorari denied, 307 U. S. 628.

[5] See Canons 1, 15, 16, 18, 21, 22, 32, of the *Canons of Professional Ethics* promulgated by the American Bar Association.

assume, therefore, that petitioners' contempt has been correctly described both by Judge Medina and by the various judges of the Court of Appeals.

The issue which we believe to be presented by the question as framed by this Court is whether Judge Medina was authorized under Rule 42 (a) of the Federal Rules of Criminal Procedure to find petitioners guilty of contempt at the end of the trial rather than immediately upon the occurrence of each item of misconduct. This point is considered in Point I of this brief and of petitioners' brief. Petitioners, however, have raised two other questions. The first (Pet. Br., Point II, pp. 25–32) relates to whether the district judge's finding in Specification I, reversed by the Court of Appeals, that petitioners had deliberately agreed upon a plan to wreck the trial, was the gravamen of and inseparable from the other 37 findings of contempt sustained by the court below. This question, raised by the fifth of the Questions Presented in the petition for certiorari (p. 13), is concerned with the construction of the Contempt Certificate, not with the authority of the court under Rule 42. The second of these questions, as stated by petitioners (Br., Point III, pp. 32–44) is whether they "were denied due process of law because the accusing Judge had a substantial interest in their conviction and punishment." This point was raised by the fourth of the Questions Presented in the petition, and also does not seem to lie within the

scope of the issue framed by this Court.* The substance of the point—that Judge Medina was biased—was rejected by the Court of Appeals in *United States* v. *Dennis*, 183 F. 2d 201, 225–226, affirmed (without consideration of this point, as to which certiorari was not granted), 341 U. S. 494.

Even though we do not think these questions properly before the Court at this time, it has seemed the best course for us to meet these contentions in this brief, and they are answered in Points II and III.

I

THE POWER OF THE TRIAL JUDGE UNDER RULE 42 (A) TO PUNISH THE PETITIONERS SUMMARILY FOR CONTEMPTS COMMITTED IN HIS ACTUAL PRESENCE COULD BE EXERCISED, AS IT WAS, AT THE CONCLUSION OF THE TRIAL

As we have shown in the Statement of Facts, Judge Medina determined that petitioners were engaged in deliberate misbehavior with a view to disrupting the trial, and that if he had proceeded immediately to punish petitioners on each of the many occasions when they misbehaved in the presence of the court, such action would have aided petitioners in achieving their unlawful objective. Accordingly, the court warned peti-

* We assume that if the Court had intended to allow petitioners to argue the first five of the Questions Presented in the Petition for Certiorari, all of which petitioners have argued, it would not have limited the argument to the single question stated.

tioners from time to time that their misbehavior was contemptuous or improper or a defiance of the court's directions and that it would be acted upon at the close of the trial, when the court's action would not contribute to the disruption of the trial. In keeping with the warnings during the trial, the court proceeded summarily to punish petitioners for their misbehavior at the first appropriate opportunity, which was immediately after the verdict of the jury was returned.

This procedure was proper, for where, as here, immediate action would disrupt the proceeding or is otherwise impracticable, the court may properly stay its hand during the trial, until its action will not contribute to the contemnor's purpose. It has never been the law, as we show below, that the summary contempt power must be exercised immediately to remove an impending obstruction to the further functioning of the court. The power may also be exercised to preserve the court's authority and to prevent the administration of justice from falling into disrepute.

Unquestionably, Judge Medina could have punished summarily each instance of contempt as it occurred in the courtroom. Petitioners contend, however, that he lost his power to punish summarily under Rule 42 (a) by waiting until the end of the trial in *United States* v. *Dennis* so as to avoid the disruption of that case. Their position is that a judge may punish summarily

for contempt "committed in the actual presence of the court" only if at the instant such contempt is committed "immediate punishment is necessary to prevent demoralization of the court's authority" (Pet. Br., p. 9). We contend, to the contrary, that a Federal judge may defer summary punishment for contempt committed in his actual presence to the earliest time when such action will not disrupt the pending proceeding. We believe that our view of the power of a Federal judge to punish summarily contempts committed in his presence is consistent with the language and purposes of Rule 42 (a), is supported by *Ex parte Terry,* 128 U. S. 289, so far as that decision goes, and is clearly supported by the decisions of the lower Federal and State courts.

Rule 42 (a) of the Federal Rules of Criminal Procedure provides that "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." The Note to subdivision (a) of Rule 42 states: "This rule is substantially a restatement of existing law *Ex parte Terry,* 128 U. S. 289; *Cooke* v. *United States,* 267 U. S. 517, 534." The principle it embodies has long been recognized throughout the United States, both in Federal and State courts. Nothing in the language supports the petitioners' contention that if a judge is to impose punishment for such a contempt without notice and

hearing he must do so at the instant the contempt occurs. And, as we show (*infra*, pp. 32–43), the authorities are uniform that the doctrine set forth in the Rule is not to be so narrowly construed.

The words "summary" and "summarily" in the Rule and its title do not require immediate, extemporaneous action. Rather, it is clear, those words are used in a procedural sense, in contrast to the notice and hearing requirement of paragraph (b). Thus, the structure of the Rule shows that "summarily" is used as meaning without notice and hearing. This Court has often used the words to denote a mode of procedure. See, *e. g.*, *Fisher* v. *Pace*, 336 U. S. 155, 159–160, 163, 167; *Nye* v. *United States*, 313 U. S. 33, 52, 53, 54, 55, 57; *Ex parte Grossman*, 267 U. S. 87, 117–118.

At most, "summarily" means that the judge shall act as expeditiously as circumstances permit, which often may not be until the end of the trial. Most trials are concluded within a day or two. The fact that the trial here was of unusual duration does not detract from the judge's power to punish summarily at its conclusion for contempt during its course. Thus, although "summarily" often carries the connotation of prompt action, that condition is satisfied when the judge acts as swiftly as is practicable without impairing the administration of justice by halting the trial. As the Ninth Circuit declared

in *MacInnis* v. *United States*, 191 F. 2d 157, 160–161, petition for certiorari now pending, No. 281, Oct. Term, 1951:

> "* * * immediate penal vindication of the dignity of the court * * *", as used in *Cooke* v. *United States*, 1925, 267 U. S. 517, 536, 45 S. Ct. 390, 69 L. Ed. 767, means as speedy vindication as is practicable in the circumstances, and does not require steps which would break up a trial or frustrate the powers of the judge.
>
> We are of the opinion that while punishment should follow acts of contempt with reasonable promptness, the punishment need not follow instanter if, as in the case before us, such an imposition would endanger the due progress and termination of the trial.

See also the opinion of the Supreme Court of Minnesota in *In re Cary*, 165 Minn. 203, 206 N. W. 402, quoted at p. 38, *infra*.

Petitioners rely, not on the language of the Rule, but on what they allege is its exclusive purpose, for their contention that a contempt may be punished summarily only at the instant it is committed. For they assert that a judge can proceed summarily under Rule 42 (a) only if immediate punishment is necessary to prevent demoralization of the court's authority. And by this petitioners mean such action as will halt the contemptuous action immediately.

But "demoralization of the court's authority," a phrase taken from *Cooke* v. *United States*, 267

U. S. 517, 536, and *In re Oliver*, 333 U. S. 257, 275, will occur just as effectively if contemptuous action interferes with a court's primary responsibility of conducting trials and bringing them to a reasonably prompt conclusion. This Court recently stated in *Fisher* v. *Pace*, 336 U. S. 155, 159, that the power of courts to punish for contempt in the face of the court "is essential to preserve their authority and to prevent the administration of justice from falling into disrepute." But what surer way is there of impairing judicial authority and discrediting the judicial process than to force the court either to submit to contemptuous conduct or to risk disruption of important trials by immediately punishing such conduct?

The reasons for allowing the judge before whom a contempt is committed to punish without additional notice and hearing are not simply to preserve order in the court room, important as that may be. But even that purpose can in some circumstances be better attained if punishment is delayed until the end of the trial. Immediate punishment will not, as Judge Frank stated (3R. 96) "undo the contempt, ever a thing of the past. Therefore, the exceptional power to punish summarily cannot be founded on the ability to forestall the punished behavior. Summary punishment, then, since its effect is wholly prospective, must be justified solely by the fact that it will tend to prevent future misconduct—either (1)

in the future course of the same case or (2) in future cases." Where an object of the disorder may be to break up the trial, the prevention of similar disorders and disobedience in future cases requires that the contemnors not achieve their goal by provoking the judge into immediate retributive action. As we have suggested, the preservation of order in the court is merely one facet of protecting the primary function of the courts, the administration of justice, and plainly a basic objective of the summary contempt power is to safeguard that vital public interest.

Punishment for contempt, committed in the face of the court, without further notice or hearing, is also justified by the fact that when the judge has seen and heard what happens, there is no occasion for further trial. See *Matter of Douglas* v. *Adel,* 269 N. Y. 144, 146. Indeed, to require such a matter to be tried before another judge, with the original judge merely one of the witnesses as to what occurred, would not only impair judicial dignity but, more importantly, deprive a judge's orders of much of their effectiveness. For, obviously, his authority would be lessened if proof of disrespect for the court depended upon the taking of testimony of the judge, interested parties, and other persons in the courtroom, as to whether an attorney had shouted, sneered, or emphasized an insulting word. As stated in *Fisher* v. *Pace,* 336 U. S. at 161:

> In a case of this type the transcript of the record cannot convey to us the complete

> picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge.

In the instant case, Judge Medina saw and heard the conduct which he held to constitute contempt. That such misconduct often did not appear on the face of the record was recognized by the Judge, who stated that he (2 R. 85–86) "observed in the conduct of counsel before me here, sneering, snickering, obvious indications of one to another 'Get up, it is your turn now, go at it next, keep this thing going,' and so on." Petitioners contend that they could be punished for contempt at the end of the *Dennis* trial only after a hearing before another judge. In such a hearing, the trial transcript would undoubtedly be introduced in evidence. It would be necessary for Judge Medina to testify as to the attitude, tone and gestures of the petitioners, and the petitioners would seek to cross-examine him. The petitioners would testify as to their motives and as to the attitudes and tones of the trial judge which they allege indicated bias on his part. Spectators, including members of the jury, of the acts constituting the alleged contempts could be called as witnesses.

Such a spectacle would indeed produce "demoralization of the court's authority." We venture to say that a Federal judge faced with such

an experience, when confronted with contempt committed in his actual presence, will either punish summarily for contempt as it occurs, without regard to the effect of such action upon the pending trial, or he will let the contempts go unpunished. Such a result must follow if, as petitioners contend, Judge Medina could proceed under Rule 42 (a) solely for the purpose of preventing further and immediate disruption of the court's proceedings.

We think that the power to punish summarily for contempts in the presence of the court rests on this bundle of reasons, and not merely upon the necessity for immediate action which petitioners assert to be its exclusive object. And since the power has this multifold basis, it would not be proper to read into it, or into the Rule which embodies it, a time limitation which it does not contain, but upon which petitioners insist. On the contrary, the absence of any such limitation in the Rule—after the point had been raised specifically before this Court in the leading case of *Ex parte Terry*, 128 U. S. 289—is strong evidence that the Rule read literally embodies the historic practice and that its effectiveness should not be diminished by a restrictive misinterpretation.

In the instant case, Judge Medina's judicial function at the time the contempts herein occurred was to conduct the trial in *United States* v. *Dennis*, involving charges of violation of the

Smith Act. That trial was one of the longest in American judicial history. From January 17 to March 1, 1949, the proceedings were devoted to the defendants' challenge of the entire jury system as administered in the Southern District of New York. After a series of motions by the defendants, the process of selecting a jury took from March 8 to March 17. The presentation of evidence began on March 23 and was completed on September 23, 1949. During the trial the defendants themselves and the petitioners as their counsel bombarded the trial judge with a variety of affidavits of bias and motions for mistrial, and also subjected him to every variety of contemptuous conduct. During the course of the trial, the defendant Gates was punished summarily for contempt of court in refusing to answer pertinent questions, and the defendants Hall, Winston, and Green were punished summarily for contempt of court in the form of disorderly conduct in the courtroom (1 R. 51; 2 R. 511–512, 543). These contempt convictions were upheld in *United States* v. *Gates,* 176 F. 2d 78 (C. A. 2); *United States* v. *Hall & Winston,* 176 F. 2d 163 (C. A. 2), certiorari denied, 338 U. S. 851; and *United States* v. *Green,* 176 F. 2d 169 (C. A. 2), certiorari denied, 338 U. S. 851.

It was in this unparalled context that the trial judge was confronted with the repeated contempts committed by the petitioners as counsel for the defendants in the *Dennis* case. It is

true that as each such contempt occurred, the trial judge could have proceeded, without notice and hearing to adjudicate the particular petitioner in contempt and to impose punishment. But while it was feasible without halting the trial for the trial judge to commit Gates, Green, Hall and Winston to jail for contempt while ordering that they be produced in court each day, no such procedure could be followed with respect to their lawyers, these petitioners. The imposition of punishment of a term of imprisonment to be served without delay could only have had one of two consequences: either the immediate serving of such sentence would have deprived some of the defendants in the *Dennis* case of counsel, thereby precipitating a mistrial at least as to such defendants, or, in the event of an appeal by the petitioner adjudged in contempt, he could plausibly assert that he must withdraw from the prolonged trial in order to prepare his appeal. As Judge Medina found (3 R. 32):

> * * * There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. * * *

It would have been possible for the trial judge to have proceeded immediately under Rule 42 (a)

to find that each contempt had occurred, and to have imposed a term of imprisonment as punishment therefor, but to have suspended the execution of sentence until the completion of the trial. This was the procedure followed in *Hallinan* v. *United States*, 182 F. 2d 880 (C. A. 9), certiorari denied, 341 U. S. 952, pending on petition for rehearing as No. 300, October Term, 1950. Such a sentence would be an appealable order even though execution was deferred. *Berman* v. *United States*, 302 U. S. 211, 212. However, as Judge Frank pointed out (3 R. 102):

> Had the judge, in each instance, cited and sentenced immediately—although deferring execution—he would have been obliged to stop this trial more than thirty times, in order to prepare, pursuant to Rule 42 (a) written orders specifying, in each instance, the particular contempt. Moreover, in each such instance, the sentenced lawyer would doubtless immediately have appealed, and would have had the right to argue the appeal *pro se*. The trial judge would then have had to adjourn the trial at least thirty times to allow the lawyers to prepare and argue those appeals.

The trial judge in this case could also have summarily adjudicated petitioners in contempt as the contempts occurred and deferred imposition of sentence until the end of the *Dennis* trial, again for the purpose of avoiding its disruption; this was the course followed in *MacInnis* v. *United*

States, 191 F. 2d 157 (C. A. 9), now pending on certiorari, No. 281. This is in substance what he did as to a number of the specifications of contempt. (Nos. XXXVIII, XXXVII, XXXVI, XXXIV, XXXII, XXXI, XXV, 1 R. 71–72, 69, 68, 66, 60–61, 55, 50.)[7] In any event the difference between this procedure and that followed by Judge Medina is insubstantial. It is certainly not great enough to be read into the Rule as a decisive distinction.

It is plain that persons who have committed contempt can not be said to derive any advantage from the *Hallinan* or *MacInnis* procedures as opposed to the course of action followed by Judge Medina. One of the greatest dangers in the power to punish summarily for contempt is that a judge in anger will take action which he would not have taken in a calmer moment. Persons charged with contempt have no rational basis for objection because the judge defers both his adjudication as to whether a contempt has been committed and, if so, the imposition of punishment, until he has had an opportunity to calm down and reflect and to view the conduct in question in the context of the whole trial.[8]

[7] *E. g.* Specification XXXVIII, 1 R. 72: "I now adjudge you in contempt for that." Specification XXXIV, 1 R. 66: "again you have become contemptuous."

[8] See the opinion of Judge Frank (3R. 102–103):

> This argument puts a premium on hasty action. It means that the judge may act summarily only when he is

That is what Judge Medina actually did. In the *Hallinan* case, the trial judge proceeded under Rule 42 (a) to impose punishment for contempt at 9:30 a. m. on the day following the last of the conduct specified as contempt in his certificate, but suspended the sentence until the close of the trial. Under petitioner's view, this course of action presumably would be more proper than that followed by Judge Medina, as would also the course of events in *MacInnis* where the contempt occurred on February 1, the trial judge informed MacInnis on February 2 that he would file a certificate under Rule 42 but would defer punishment until the end of the trial, the certificate of contempt was signed on February 28, and the sentence was pronounced on April 4.

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least likely to be poised and temperate, that only then may he act without a hearing. Why such instant action is fairness or due process—adequately protective of the accused—and postponed action is not, remains unexplained by proponents of this contention. Curiously enough, those who (1) argue that such instant action is an indispensable condition of summary punishment also (2) counsel (and wisely) that the use of the summary power be narrowly circumscribed, for fear that the trial judge, in using it, may do so in haste, spurred to vindictiveness by the anger of the moment. I find it difficult to reconcile those two contentions: The first insists that summary punishment is not valid unless hasty. The second points to the potential danger of haste.

There is such danger. Judges, being human, may, on occasions, respond excessively to slight provocations, if they act impulsively. Where, as here, the judge waited and reflected before he acted, there is considerable assurance that impulsiveness could not have affected him.

The problem confronting Judge Medina in the *Dennis* case, like that of Judge Harris in conducting the *Bridges* trial out of which the *Hallinan* and *MacInnis* contempt cases arise, was to deal with the persistent contemptuous conduct of defendants' counsel in such a way as to avoid disruption of the main proceeding. Judge Medina dealt with the problem by repeatedly warning counsel of the character of their conduct and by postponing both the adjudication of contempt and the imposition of sentence until the end of the *Dennis* trial. The petitioners do not even suggest that they were injured by the deferment of action under Rule 42 (a), while it is clear that such deferment, by enabling the *Dennis* trial to continue to its conclusion, served "to prevent the administration of justice from falling into disrepute" (*Fisher* v. *Pace*, 336 U. S. 155, 159).

Petitioners have not cited a single decision of any American court holding that a judge loses his power to punish summarily for contempt committed in his actual presence by waiting to the end of the proceeding in which the contempt occurred. The leading decision of this Court in *Ex parte Terry*, 128 U. S. 289, refutes any such contention. In that case, the facts were that while the court was reading an opinion in open court, Terry assaulted a marshal within the sight and hearing of the court and then left the scene. "As soon as the disturbance had ceased, Justice Field proceeded with the reading of the opinion,

after which orders were made by the court adjudging Mr. and Mrs. Terry guilty of contempt, and directing their imprisonment as a punishment therefor." *In re Terry,* 36 Fed. 419, 420 (C. C. D. Calif.)[9] That is, on the same day, the Circuit Court, in Terry's absence and without notice to him, adjudged him guilty of contempt. In this Court, Terry urged in his brief substantially the same argument as petitioners now make. He argued (128 U. S. at 293):

> We do not deny that it was within the power of the court *instantly,* upon the commission, in its presence, of the alleged contempt, and the offender continuing to be present, to adjudge the offending party guilty of contempt, and to order imprisonment.
>
> But here the record discloses, not only that the petitioner was *not instantly proceeded against,* but that he was allowed to depart from the court, and was not again brought before it in such a way as to compel him to take notice of all orders and steps in the totally separate and distinct proceedings in the contempt case.

That argument was rejected by this Court as follows (at p. 311):

> * * * Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence

[9] The facts recited in the opinion of the Supreme Court are not as detailed as they are in the report of the case in the lower court.

> of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment.

It is true that the last paragraph in the *Terry* opinion (p. 314) reserves the question whether "that procedure could be followed 'at a subsequent term, or at a subsequent day of the same term.'" (See *Pendergast* v. *United States*, 317 U. S. 412, 419.) But the reasoning of *Ex parte Terry* is squarely opposed to the petitioners' basic contention that contempt may be punished summarily only at the instant such contempt occurs and then only to prevent further and immediate disruption of the judicial process.

The crux of the *Terry* case is that Terry was not punished summarily as a preventive measure, for he had left the courtroom and the Circuit Court had resumed its business. The sole purpose and effect of the Circuit Court's contempt action was to impose punishment as such upon Terry in order to demonstrate that disorderly conduct in the courtroom would not be tolerated. It was clearly not a situation in which "*immediate* punishment is necessary to prevent 'demoralization of the court's authority'" *in the particular case,* which is the test upon which petitioners' argument rests.

This court has not had occasion since the *Terry* case to consider the present problem, for con-

tempts of this sort are fortunately rare. "But the state and lower federal courts have uniformly rejected the petitioners' thesis that the power to punish summarily for contempt must be exercised instantly upon the occurrence of the attempt or not at all. Thus, *Middlebrook* v. *State,* 43 Conn. 257, upon which this Court relied in *Ex parte Terry* (128 U. S. at 312), involved the plaintiff in a civil suit who assaulted defense counsel in the course of his argument and then fled. The court issued process for his apprehension, but his presence was not secured. Seventeen days after the contempt—when it was clear that the contemnor would not appear before the court—the court entered a contempt order sentencing him to imprisonment and to pay a fine. On appeal it was argued, *inter alia,* that the delay of seventeen days defeated the jurisdiction of the court to impose punishment summarily (43 Conn. at p. 264), but the court rejected the argument, as follows (43 Conn. at pp. 268–269):

> The offense was intentionally committed in the presence of the court. When the first blow was struck, that instant the contempt was complete, and jurisdiction attached. It did not depend upon the arrest of the offender, nor upon his being in actual custody, nor even upon his remaining in the presence of the court. When the offense was committed he was in the presence, and, constructively at least, in the power of the court. He may by flight es-

> cape merited punishment; but that cannot otherwise affect the right or the power of the court. * * * The judicial eye witnessed the act, the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment.
>
> It will hardly be denied that the court might have done that the instant the offense was committed and before the plaintiff had left the court room. We *think it is equally clear that the judge was not bound to do it at once, but might do it within any reasonable time before the term closed.* The delay was manifestly for the plaintiff's benefit and in no sense to his prejudice, the time being improved in fruitless attempts to secure his presence in court. It seems reasonably clear that he has no just grounds for complaining of the delay. [Italics supplied.]

Subsequently, in 1913, the Court of Appeals for the Ninth Circuit rejected the argument which petitioners make in this case. In *In re Maury*, 205 Fed. 626, the facts were that in selecting a jury and in the opening statement to the jury, counsel made statements disrespectful to the jury. The court admonished counsel on the second occasion and the trial of the case continued. On the following afternoon after the case had been submitted to the jury, the court entered its summary contempt order. The Court of Appeals

rejected the argument that the trial judge erred in waiting until the next day to impose the contempt judgment, stating (205 Fed. at p. 632):

> We are of opinion that the rule laid down in the case of Terry is entirely applicable to the case before this court. Obviously there can be no distinction between delaying until later in the same day, and delaying until the next day, before making an order adjudging an offender guilty of contempt of court; jurisdiction of the person of the offender having attached instantly upon the contempt being committed in the presence of the court." [10]

In 1925, the doctrine of the *Maury* and *Middlebrook* cases was adopted by the Supreme Court of Minnesota in an opinion which, we submit, furnishes a convincing rationale for the view which we take. *In re Cary,* 165 Minn. 203, 206 N. W. 402. In that case, defense counsel committed acts of contempt during the course of a criminal trial. After the case was submitted to the jury, the court imposed sentence for the contempts. On appeal, he contended, as do peti-

[10] The fact that Maury was given an opportunity to argue to the court before he was adjudged in contempt does not aid petitioners. If, as their position contemplates, a contemnor must be accorded notice and a hearing when immediate punishment is not imposed to remove a present obstruction, they can draw no comfort from the *Maury* decision. For Maury had neither notice nor a hearing in the sense that he was afforded an opportunity to adduce evidence, and clearly there was no pending obstruction to the court's business when he was adjudged in contempt.

tioners, that direct contempts may be punished summarily only at the time they are committed, and that the court lost jurisdiction by waiting until the jury had retired before taking action. In rejecting the argument the Supreme Court of Minnesota stated (165 Minn. at pp. 204–205, 206 N. W. at pp. 402–403):

> * * * A court may, and usually does, impose punishment for a direct contempt at the time the offense is committed, but it does not follow that jurisdiction is lost by waiting for a more fitting or convenient time.
>
> *We know of no law or rule requiring the court to suspend a trial for the purpose of passing judgment on a contemner and making the necessary record thereof. Where a defendant is on trial for a grave crime, it might result in serious prejudice to him if his attorney were to be adjudged guilty of contempt and subjected to punishment therefor in the midst of the trial.* While the court may punish a direct contempt instanter, yet, if of opinion that imposing punishment at that time would be unwise, or that prejudice to some of the parties before the court might ensue therefrom, it may defer action in the interest of justice and fairness, and does not lose jurisdiction by doing so.
>
> Of course the power to punish as for a direct contempt must be exercised promptly, if exercised at all; but the time within which it must be exercised is not

> well defined, and depends in a large degree upon the facts and circumstances of the particular case. In the present case the power was exercised as soon as the jury had retired and before the verdict was returned; and *we are clearly of opinion that jurisdiction to exercise it would continue at least until the trial was fully completed.* * * * [Italics supplied.]

More recently, the Court of Appeals for the Ninth Circuit came to the same conclusion in the *Hallinan* and *MacInnis* contempt cases, now pending before this Court. See pp. 29–32, *supra*. It should also be noted that in *United States* v. *Dennis*, 183 F. 2d 201, 225, a panel consisting of the three judges of the Second Circuit not participating in the instant case (L. Hand, Swan and Chase, JJ.) also expressed their approval of Judge Medina's course of action, as follows:

> * * * at times he [the trial judge] warned them [petitioners] that if they persisted in conducting themselves as they had been doing, he would punish them when the trial was over. (*An entirely proper action*, for to commit them pending the trial would have broken it up, and to be silent might well have misled them.) [Italics supplied.]

The same position was taken in *In re Grossman*, 109 Cal. App. 625, 631–632, 293 Pac. 683, 685–686; *In re Willis*, 94 Wash. 180, 184–185, 162 Pac. 38, 39–40; cf. *Albano* v. *Commonwealth*, 315 Mass. 531, 532–535, 53 N. E. 2d 690, 691–692.

Within the past decade, the Court of Appeals for the Eighth Circuit has adopted the rule of the *Maury* and *Cary* cases, stating that jurisdiction to punish for direct contempt continues until the trial of the suit is terminated. *O'Malley* v. *United States,* 128 F. 2d 676, 684, reversed on another ground *sub nom. Pendergast* v. *United States,* 317 U. S. 412.[11] Other courts have sanctioned summary imposition of sentence for direct contempt at a time other than immediately at the time of the offense without expressly discussing the question. *White* v. *George,* 195 Ga. 465, 24 S. E. 2d, 787; *Curran* v. *Superior Court,* 72 Cal. App. 258, 236 Pac. 975.

In brief, the decisions of every Federal and State court which has considered the problem[12]

[11] The Court of Appeals regarded the case as one involving direct contempt and, hence, invoked the rule of the *Maury* and *Cary* cases. The Supreme Court, however, regarded the case as one of indirect contempt which was subject to the statute of limitations. It was in meeting the Government's argument based, in part, on the *Maury* and *Cary* cases, that the Supreme Court pointed out that the question whether summary punishment for direct contempt could be imposed "at a subsequent term, or at a subsequent day of the same term" was a "problem peculiar to direct contempts in the face of the court," which had no relevancy to the problem of the statute of limitations. 317 U. S. at p. 419.

[12] In the sole case which petitioners cite to the contrary, *Gridley* v. *United States,* 44 F. 2d 716 (C. A. 6), the trial judge, after the end of the trial, proceeded upon notice and hearing to punish for a contempt committed in the actual presence of the court during the trial. The question of whether by delaying contempt action until the end of the trial the court lost the power to proceed summarily under Rule 42 (a) was not litigated.

are opposed to petitioners' fundamental contention that the power to punish summarily for contempt must be exercised instantly upon the occurrence of the attempt and solely to prevent further and immediate "demoralization of the court's authority," or not at all.

Petitioners rely heavily upon language from this Court's opinions in *Cooke* v. *United States*, 267 U. S. 517, and *In re Oliver*, 333 U. S. 257. It is sufficient to note that in neither of those cases was the alleged finding of contempt based solely upon conduct of the defendant in the actual presence of the court.[13] The language from those opinions upon which petitioners rely does indeed emphasize that the power to punish summarily for contempt can be applied only to such conduct in the actual presence of the judge as creates "an open threat to * * * orderly procedure." And it is equally true, as suggested in those opinions, that such conduct must normally be "instantly suppressed and punished" or "demoralization of the court's authority will follow." However, neither of those cases was concerned with the present problem of whether a court, after warning the persons engaged in contemptuous conduct, could defer proceeding under Rule 42 (a) to a time which would not disrupt the pending trial. Moreover, for reasons already stated (*supra*, pp.

[13] In the *Oliver* case, the Michigan judge was relying in part upon testimony given by others in the defendant's absence. 333 U. S. at 277.

22–24), the generalization as to "demoralizing the court's authority," is broad enough to include the present situation. That the court in the *Cooke* case would have agreed with the decision below is suggested by the statement that (267 U. S. at 539)

> * * * Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed.

The whole body of American decisions stands for the proposition that the power to punish summarily for contempt committed in the actual presence of the judge may be used to punish for a completed act of contempt where there is no likelihood of its early recurrence. In such cases as *Terry* and *Middlebrook,* there was no need for summary action to prevent repetition of the contemptuous conduct. What was needed in those cases, and what occurred, was punishment as promptly as was practicable, imposed without prior notice and opportunity for hearing. In the instant case, the trial judge summarily punished the petitioners as soon as he could do so without disrupting the Dennis trial. By such deferred action, he maintained the effective administration of criminal justice in the Southern District of New York. Acting when he did, it is probably that he acted with greater calm than any judge could have maintained at the instant

the contempts occurred. And he was able to view the contempts in the context of the whole trial.

We think it plain that the sensible procedure which Judge Medina adopted not only was warranted by the terms of Rule 42 (a) but was required if the purpose of the Rule was to be achieved.

II

SPECIFICATION I CHARGING AS A CONTEMPT A CONTINUING JOINT EFFORT TO OBSTRUCT THE TRIAL IS A SEPARATE OFFENSE FROM THE SPECIFIC ACTS OF MISCONDUCT CHARGED IN THE OTHER SPECIFICATIONS, AND ITS INVALIDITY, OR THE PRELIMINARY STATEMENT OF THE CERTIFICATE, DOES NOT AFFECT THE VALIDITY OF THE OTHER SPECIFICATIONS

Petitioners argue that the first specification of contempt, charging a joint concert of action throughout the trial by all petitioners to obstruct the administration of justice, which was set aside by the court of appeals, must be read into the remaining thirty-nine specifications relating to specific acts of contempt by individual petitioners. Accordingly, they contend that all the remaining specifications must fall with it. They rely on Judge Medina's preliminary statement as support for their argument that the certificate must be read as simply a conviction for conspiracy. The certificate as well as the orders adjudging petitioners guilty of contempts demonstrate that there is no substantial basis for this position.

After the preliminary remarks, the certificate states that petitioners are adjudged "guilty of

the *several criminal contempts*[14] described below" (1R. 18). Then follows each petitioner's name with a list of the specifications of which he is adjudged guilty, including not only Specification I but also certain of the remaining 39 specifications charging specific acts of misconduct during the trial.

Each order (1R. 11–16) adjudges the particular petitioner concerned "guilty of *contempts* of court as specified in the accompanying certificate," listing the specifications which relate those contempts. It then sentences him "on *each contempt*," the "sentences [to] be served concurrently" (1R. 11–16).

Thus, it is evident that the judge found each petitioner guilty of several contempts, including not only the concerted action charged in Specification I but also the specific acts of misconduct charged in the other specifications. Judge Medina proceeded on two theories, one applicable to the first specification and the other applicable to the remaining specifications. Not only was he of the view that petitioners' specific acts of misconduct were contemptuous, but also that their conduct resulted from an agreement. The latter he thought was a separate and distinct contempt, deserving separate punishment. This appears not only from the fact that he charged separate contempts, but also because he imposed separate punishment for the offenses described in Specifications II–XL.

[14] All italics herein are supplied.

It would be a strained construction to hold that these deliberately formal adjudications were modified by the preliminary statement in the certificate. "A judgment 'does not reside in its recitals, but in the mandatory portions.'" See *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 928 (C. A. 2), certiorari denied, 333 U. S. 873; *Eckerson* v. *Tanney*, 235 Fed. 415, 418 (S. D. N. Y.), affirmed, 243 Fed. 1007 (C. A. 2). Here, the meaning of the adjudications is unambiguous.

Petitioners rely principally on the second paragraph in the preliminary statement (1R. 17–18), in which Judge Medina concluded that petitioners' acts "were the result of an agreement between these defendants [petitioners], deliberately entered into in a cold and calculating manner, * * * for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue." This preliminary finding of agreement was reflected in Specification I of the Contempt Certificate.

In the third paragraph of the preliminary statement, however, Judge Medina found that "the acts, statements and conduct of *each* of the defendants, *hereinafter specified*, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and mis-

conduct of so grave a character as to make the imposition of fines a futile gesture and a wholly insufficient punishment." [Italics supplied]. This statement clearly applied to the conduct of each of the individual petitioners separately, as defined in the last 39 specifications. It was not predicated on the agreement or conspiracy charged in Specification I and described in the preceding sentence. The finding as to the petitioners' wilfulness obviously rested upon the conduct of each of them in open court, just as did similar findings as to the wilfulness of the contempt in *Ex parte Terry*, 128 U. S. 289, 298,[15] and in the order upheld in *Fisher* v. *Pace*, 336 U. S. 155.[16]

The preliminary statement read as a whole thus does not support petitioners' contention that all of the specifications of contempt rested on the finding of agreement or conspiracy, but the contrary. Certainly, clear and unambiguous language would be necessary to overcome the plain manifestation in the formal judgments and the remainder of the Contempt Certificate that each

[15] The order in the *Terry* case, which was based upon contempt occurring in the presence of the court, recited that Terry assaulted the United States marshal "with intent to obstruct the administration of justice, and to resist such United States marshal and the execution of the said order" (128 U. S. at 298).

[16] The order upheld in *Fisher* v. *Pace* stated that Fisher "wilfully interrupt[ed] the business of the Court and impair[ed] respect to its authority." *Ex parte Fisher*, 206 S. W. 2d 1000, 1006.

specification contained an independent finding of guilt for which an independent, though concurrent, punishment was imposed. We submit that there is no warrant for construing the preliminary statement as modifying the judge's formal adjudications that petitioners were guilty of specific contemptuous acts—particularly since Specifications II–XL as isolated events were clearly contemptuous.

The Certificate is analogous to an indictment where a defendant is charged in one count with conspiracy and in others with substantive offenses. Convictions on the substantive counts do not fall if a conviction on the conspiracy count is reversed. Cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641–644; *Long* v. *United States,* 139 F. 2d 652, 653–654 (C. A. 10). And a conviction must be affirmed if any one of a number of concurrent sentences was validly imposed. *Hirabayashi* v. *United States,* 320 U. S. 81, 85. The judge may well have had these rules in mind when he imposed the equal concurrent sentences. But this would hardly demonstrate that he considered the last 39 charges as inextricably interwoven with and inseparable from the first. On the contrary, it would demonstrate that he wished each to stand upon its own independent foundation.

Petitioners' argument comes down to the contention that if, as has been held in this case, they cannot be convicted in this proceeding on the

charge of agreement to commit contempts, then the petitioners cannot be convicted of any of the substantive offenses committed by them during the lengthy trial of their clients. No such contention could be made if Specification No. 1, charging joint action, had been omitted from the Certificate. It is clear that each of the 39 specifications of contempt charges a separate and distinct offense, each independent of all the others. The theory that each and all of them must fail with the specification containing what amounts to a charge of conspiracy does not seem to be based on any recognized principle of law. Petitioners cannot escape punishment for their offenses on the basis of any such unsound theory.

Judge Medina clearly indicated his intention to convict petitioners for their specific acts of misbehavior, as well as for their concerted action, and to impose separate sentences for each offense. Accordingly, the invalidity of Specification I does not affect the validity of the other convictions.

III

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS BY THE FACT THAT JUDGE MEDINA HIMSELF DETERMINED THAT THEY WERE IN CONTEMPT

Petitioners argue that Judge Medina "had such an interest in the conviction and punishment of the petitioners as to render the same void for lack of due process" (Br. p. 32). The asserted interest is said to flow from his statement (1 R. 18)

that petitioners' scheme to prevent continuance of the trial contemplated the impairment of his health as a means to that end.[17]

The basic principle that a person may not judge a case in which he has an interest (*Tumey v. Ohio*, 273 U. S. 510) has never been deemed applicable to contempt committed in the presence of the court, even when the contempt consisted—as it often did—of a manifestation of disrespect for or hostility to the judge personally. The reason is that in the court room the official and personal capacities of the judge cannot be separated, and that preservation of the orderly administration of justice requires that respect for the court must be maintained. On petitioners' theory, a judge would have no power to punish an attorney, party, or other person who climbed over the bench and attacked him with his fists or a blackjack; for in that case the assault would be upon the judge personally, would doubtless be designed to impair his health, and would almost certainly provoke his personal ire. Nor could a judge punish a person who repeatedly insulted him in the courtroom. The contention that a judge so provoked could not punish the assailant for contempt but must transfer the matter to another judge embodies a novel and startling doctrine.

[17] To the extent that petitioners' object was to break up the trial, as Judge Medina found (1 R. 18), it can be assumed that the same tactics would have been employed whatever judge was sitting, and that any effort to impair the judge's health so that the trial could not continue was a strategic move rather than a personal attack upon the judge.

Cooke v. *United States*, 267 U. S. 517, upon which petitioners rely, stands for no such proposition. On the contrary, the *Cooke* case recognizes that the judge could punish "disrespect to the court, when occurring in open court" (267 U. S. at 534), which it also characterized as a "flagrant defiance of the person and presence of the judge" (p. 536). The contempt in the *Cooke* case was found not to have occurred in open court. This Court held that it was preferable for such cases to be submitted to another judge where possible (p. 539), but the opinion shows plainly that this was not regarded as a matter of constitutional right (*ibid*). And other cases in which disrespect for the judge was found by him to be contemptuous, show that the constitutional argument has no substance. Cf. *Ex parte Terry*, 128 U. S. 289; *Fisher* v. *Pace*, 336 U. S. 155; *Fleming* v. *United States*, 279 Fed. 613 (C. A. 9), petition for a writ of certiorari dismissed on motion of counsel for petitioner, 260 U. S. 752; *United States* v. *Landes*, 97 F. 2d 378 (C. A. 2); *Owens* v. *Dancy*, 36 F. 2d 882 (C. A. 10).[18]

The *Cooke* case is also significant because of its anticipation of the exact type of situation presented by the case at bar, which the Court fortunately was able to describe as "rare" (p. 539):

> Of course where acts of contempt are palpably aggravated by a personal attack

[18] *Schmidt* v. *United States*, 115 F. 2d 394 (C. A. 6), relied on by petitioners, involved contempt outside the presence of the court.

> upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed.

Although petitioners assert that Rule 42 of the Federal Rules of Criminal Procedure independently supports their contention, that Rule, and the statute from which it was derived, confirm the well-understood principle that contempt in the presence of the court, even when involving a personal attack upon the judge, is punishable by him. Rule 42 (b), entitled "Disposition Upon Notice and Hearing" contains as its sixth sentence:

> If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent.

But the first sentence of the same subdivision declares that:

> A criminal contempt *except as provided in subdivision (a) of this rule* shall be prosecuted on notice. [Italics supplied.]

Subdivision (a) relates to contempts seen or heard by the judge and "committed in the actual presence of the court." We think it clear that the exception clause at the beginning of subdivision (b) applies to all of that subdivision, including the sixth sentence, as Judge Frank declared (3 R. 94 n).

If there were any doubt as to this, it would be resolved by the Notes to Rule 42. The Note to subdivision (a) states that:

> This rule is substantially a restatement of existing law, *Ex parte Terry,* 128 U. S. 289; *Cooke* v. *United States,* 267 U. S. 517, 534.

The Note to the sixth sentence of subdivision (b) states that that provision

> is based, in part, on 29 U. S. C. 112, * * * and the observations of Chief Justice Taft in *Cooke* v. *United States,* 267 U. S. 517, 539.

Section 112 of 29 U. S. C. (§12 of the Norris-LaGuardia Act, 47 Stat. 73)[10] provided that a defendant in a contempt proceeding which "arises from an attack upon the character or conduct of such judge" may demand another judge "if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice." This obviously meant that where the contempt was in the presence of the court the judge was not expected to disqualify himself even if his "character or conduct" were under attack.

Petitioners' argument that a judge may not punish a personal attack committed in a court room would mean that the exceptions contained

[10] Section 112 was repealed in 62 Stat. 862, 866 (1948), since it had been incorporated in and superseded by Rule 42. See 29 USCA (pocket part) 112.

in § 112 and Rule 42 were both unconstitutional.[20] But the *Cooke* case, upon which the rule was predicated, demonstrates that the provision in both statute and rule for substitution of a new judge in out-of-court contempts, was approved as a wise and fair rule of judicial administration, going beyond the requirements of the Constitution.

Petitioners also rely (pp 39–40) on their repeated allegations, before and during the course of the trial in the *Dennis* case, that Judge Medina was biased. The insufficiency of the affidavit of prejudice was established in *Foster* v. *Medina*, 170 F. 2d 632 (C. A. 2), certiorari denied, 335 U. S. 909. The charges of misconduct and bias in the trial were discussed at length and rejected by the Court of Appeals in the *Dennis* case, 183 F. 2d 201, 225–226, affirmed without consideration of this point, 341 U. S. 494. The Court is respectfully referred to that opinion, of which we shall quote only the conclusion on this feature of this case (183 F. 2d 201, at 226):

> Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trials need a firm hand as much as a constant determination to give each one his due. The record discloses a judge, sorely tried for many months of turmoil,

[20] In the court below, according to Judge Frank, "the validity of that statute or of that Rule is not challenged here by anyone" (3 R. 93).

constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess. So much for the charge of hectoring counsel and unduly limiting them in the presentation of their defense. As for any disposition in any other ways to lean towards the side of the prosecution, we cannot find it in the record; if it existed it must have been in tone or bearing which print does not preserve; for, as we shall show, his charges and his rulings were, if anything, too favorable to the defense.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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